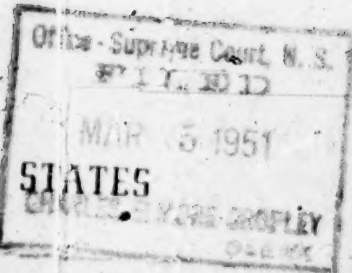


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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950

No. 363

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS
OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZ., SHIPPED
BY THE PURE FOOD MANUFACTURING CO., DENVER, COLO-
RADO, AND PURE FOOD MANUFACTURING COMPANY,
vs. Claimants, Petitioners,

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AP-
PEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Statement

The Government asks this Court to hold, in effect, that
once definitions and standards of identity have been estab-
lished for a food product, any product which resembles the
standardized article will be outlawed, regardless of its label,
its price, the manner of marketing it, or its value as a food.
As we shall point out, there are strong indications that

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variations from the norm of unstandardized foods are also regarded as illegal.

We have noted in our brief that Claimant first marketed this product as a "compound" and that, at the request of the Denver Station of the Food and Drug Administration, its name was changed to Imitation Jam. Claimant manufactures no other product.

Now the Government asks that this Court destroy the Claimant's sole product, his markets, his good will—all developed over a period of many years. Even if Claimant were able to manufacture and develop new marketing channels for pure jam, such a change-over would involve an expense and loss of business and income to such an extent that Claimant would suffer literal disaster—as, we think, would many other small businesses under such compulsion.

The suggestion of the Government that the proper remedy for the Claimant is to apply to the Administrator for an additional definition and standard of identity for low priced jam (Br. p. 70) is hardly reassuring. We suspect that this suggestion was made with but one cardinal thought—to temper the harshness of the result sought by the Government in this proceeding.

The decision urged by the Government would have other ramifications of the most serious import. It would, for example, standardize the price of food products. As the dissenting judge in the Court of Appeals pointed out in his opinion:

"A large portion of the food consumed today comes within the provisions of the Act. To sustain the government's position here gives the Federal Security Administrator absolute control over the ingredients of all such foods. He will have the right to standardize the same, which will mean virtually a standardization of the price. It will remove from the market a nutritious and wholesome food which sells for approx.

imately one-half the price of the standard product. The purchasing public, regardless of their ability to pay, will be forced to purchase the same quality of food. I cannot believe Congress had any such intent. I would affirm the trial court." (R. 67)

The practical effect will be to extend government control in the food manufacturing field far beyond any level which was suggested to Congress when the Act of 1938 was under consideration, as we shall hereafter show. We think that it can be shown that the result sought can properly be achieved only by legislation, not in a court proceeding.

Since a decision favorable to the Government would destroy Claimant's business, outlaw a wholesome food product which is used by many families in lieu of butter and butter substitutes, and would in effect standardize prices at a high level, we take this opportunity, in reply to the Government's brief, to point out and emphasize certain aspects of the Government's position which, in our opinion, are untenable.

ARGUMENT

I

The Government Seeks, Without the Requisite Statutory Authority, to Bar From Interstate Commerce Imitation and Substitute Foods Generally, in Both Standardized and Unstandardized Categories.

Although it is not so stated in the brief, there are indications that the ultimate aim of the Government is to impose a comprehensive ban upon the interstate marketing of imitation or substitute foods. This aim is apparently not limited to the outlawing of foods which fail to conform, in one detail or another, to the applicable standard of identity. It extends also to foods which do not conform to the "customary" standard or norm.

There can be no question of the purpose of the government in this case itself: it is to obtain a decision that claimant's imitation jam is an illegal product, regardless of the method in which it is marketed. The offers of proof that such foods are, in some instances, sold to consumers *as* the standardized food were evidently made primarily to illustrate the general problem created by the marketing of substandard products of this nature, with no implication that such products, if honestly sold, are not misbranded as here charged. The government's position would, of course, be the same regardless of the type of labeling carried by this product or any other article which departed from the standard of identity regarded as applicable.

We concede that there is evil in the picture drawn by the government for this court. Occasionally there is "passing off" of imitation food products to consumers. We find, however, that a contrast of the damage to the consumer who is unknowingly served imitation jam, with that which would result to this claimant and untold others were the government successful here, will weigh heavily in favor of the latter. Moreover, the housewife who *wants* to buy a cheaper product for budgetary reasons, seems entitled to some consideration in this whole matter. Perhaps she knows something of which type of product is most appropriate for her family, and should be permitted to make her own choice.

Where unstandardized foods are concerned, the substandard character of an article must be tested by the "customary" standard or norm, as Mr. Campbell points out in the discussions quoted at length by the government (Br. p. 40 et seq.). In order to appreciate the direction of the government's regulatory program in that field, we need only refer to the cases cited by the government in its brief.

In *United States v. Two Bags, Each Containing 110 lbs. Poppy Seeds*, 147 F. 2d 123 (C.A. 6), the government proceeded successfully against naturally white poppy seeds tinted blue to resemble a more expensive variety as being adulterated *in interstate commerce*. Yet the evidence clearly showed that the food was not sold *in interstate commerce* as blue poppy seeds, being invoiced as poppy seeds artificially colored. But the consumer of rolls and buns decorated with the seeds would not see the labeling and it was this factor which was determining in the mind of the court. Presumably, therefore, if the buns had borne a sticker or label showing the true character of the seeds, the result would have been the same.

Similarly, in *United States v. 36 Drums of Pop'n Oil*, 164 F. 2d 250 (C. A. 5), mineral oil for use on popcorn in theatres was held adulterated *in interstate commerce* though properly labeled, because the consumer would not know that mineral oil had been used instead of the customary vegetable oil. But here again, suppose that the dispensing machine had borne a sticker revealing the true character of the oil.

Other cases could be mentioned in the same category of departures from customary standards *at the retail level*.¹ But the point is clear. The government is, in effect, urging that there is a "relation back" of the misbranding to the interstate journey, although the actual misbranding occurs after interstate commerce is ended.

We believe that there is no basis for this theory, either under Section 403(g), as applied to standardized foods, or under any other provisions of the statute. Admitting the presence of abuses, unimpressive as they may be in the ordinary case, we submit that their correction lies with

¹ For an instance in which the government failed, see *United States v. 55 Cases, etc.*, 62 F. Supp. 843 (D. C. Ida., 1943).

Congress and that no such far reaching extension of the statute should be made by this Court on the representation of any government agency, however unimpeachable that agency's motives may be.

In this connection, the government's argument with respect to the scope of Section 403(c), the imitation provision (Br. pp. 66-69), is not overlooked. It is said that Section 403(c) remains operative with respect to a great many foods which are unstandardized. But we feel impelled to observe that this apparent tolerance of imitations of such foods is somewhat difficult to reconcile with the approach reflected in the *Poppy Seed* and *Pop'n Oil* decisions, above discussed.

II

Neither the Quaker Oats Case nor the Legislative History of the Federal Food, Drug, and Cosmetic Act Is Authority for the Exclusion of Imitation Jam from the Channels of Interstate Commerce.

The Government asserts, and argues at length in Point I of its Brief (A) that this Court's decision in *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, is conclusive of the instant case; and (B) that the legislative history of the Act reflects the purpose of Congress to ban from interstate commerce, products such as Claimant's Imitation Jam.

A. The Quaker Oats Decision is not conclusive of this case.

In *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, the Quaker Oats Company attacked regulations prescribing standards for "Farina" and "Enriched Farina" for excluding from the standards a wholesome and honestly labeled food product containing vitamin D.

This Court said (318 U. S. at 224):

"Respondent asserts and the Government agrees, that the Act as supplemented by the Administrator's standards will prevent the marketing of its product as 'farina' * * * and that respondent cannot market its product as 'enriched farina.'" (Emphasis supplied.)

This result followed from the operation of Section 403(g) of the Act. The issue in the *Quaker Oats* case was, then, whether this assumed and agreed result was contemplated by the statute, and whether the regulations prescribing the standards were reasonable and supported by substantial evidence.

This was the only point in the *Quaker Oats* case which is of interest in the instant proceeding. There was no question whatsoever involved as to the legality under the "Farina" and "Enriched Farina" standards of a product which was *not* sold as or under the name of a food for which a standard had been established. The product of the Quaker Oats Company in question was marketed as "Quaker Farina enriched by the Sunshine Vitamin", (emphasis supplied) and was, therefore, obviously, sold under the name of and as "Farina", the food for which the standard had been established. Thus, the Quaker Farina "purported and was represented" to be farina, in terms of Section 403(g) of the Act.

Clearly, therefore, the very question involved in the instant case was undisputed in the *Quaker Oats* case, i.e., whether a food which is not sold as or under the name of, the food for which the standard has been established, is misbranded under Section 403(g). It is concededly contrary to the practice of this Court to decide questions of law which are not involved in the litigation before it. Certainly this Court did not intend to pass gratuitously,

in the *Quaker Oats* opinion, upon a matter of the far reaching significance of the question here involved.

The Court's own language is witness enough to the correctness of this view. We have just seen that it was the Court's understanding that the standard would prohibit sale of the Quaker Oats Company's product *as* farina or enriched farina. We may point out that the Court also said (318 U. S., at 232):

"As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, *sold under a common or usual name, so as to give consumers who purchase it under that name, assurance that they will get what they may reasonably expect to receive.*" (Emphasis supplied.)

The above statement is quoted by the Government to indicate that our position is unsound (Br., pp. 33-34). It is submitted, however, that the portions in italics lend themselves only to the interpretation that the Court was concerned with a food sold under its common or usual name, that is, the name under which it was standardized—in that case "farina" or "enriched farina". A food sold as an imitation or under some other distinctive labeling was clearly not within the scope of the decision.

The Government cites *Libby, McNeill & Libby v. United States*, 148 F. 2d 71 (C.A. 2), which involved catsup containing a preservative not authorized by the Standard. The label revealed that the product did not comply with the standard.

The Court, holding the food to be misbranded, said (148 F. 2d at 73):

"If producers of food products may, *by adding to the common name of any such product mere words of qualification or description*, escape the regulation of

the Administrator, then the fixing of a standard for commonly known foods become utterly futile for the protection of the consuming public. (*Italics supplied.*)”

The opinion observed further that the character, appearance, and use of the product led to the conclusion that it purported to be catsup, and rejected the argument that “‘purport’ is limited to what is disclosed by the label” *and to that alone*. It seems a fair inference that it was the combination of these factors *and* the labeling which led to the conclusion that the article “purported” to be catsup. In effect, this combination added up to a sale of the product *as the food for which the standard had been prescribed*.

Thus, the real test emerges: whether the food is sold *as* the food for which the standard had been prescribed. We think that, unless the Imitation Jam was sold as the standardized food it may not be condemned, and that the Legislative History of the Act supports this view.

B. The Legislative History of the Act Does Not Reflect a Purpose to Exclude Claimant's Product from Interstate Commerce.

The Government acknowledges the presence in the Committee reports and the hearings on the proposed 1938 Act of statements “to the effect that no wholesome food was being prescribed” (Br., p. 33). It argues, however, that, if such statements refer to more than a “truly distinctive food, as compared with a variation of a standard food product, they are inconsistent with other statements from the same sources and their authority has been destroyed by the *Quaker Oats* decision”. (Br., p. 33.)

We have demonstrated that the authority of such statements was not destroyed by the *Quaker Oats* decision.

Among the statements which the Government urges have been superseded is that from Senate Report No. 493, 73rd

Cong. (1934), quoted in the Government's brief at pages 51 and 52, as follows:

"It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard have been provided; but if an article is sold under a name for which a definition and standard have been provided it must conform to the regulation. This does not preclude the use of distinctive individual brands."

The Government then says that a second Senate Report, No. 361, 74th Congress, repeated the language above quoted and then declared (Br., p. 52):

"* * * But the loophole afforded the dishonest manufacturer by the so-called 'distinctive name' proviso of the present law will be closed. Under that proviso adulterated and imitation products sold under such names were immune from action. *It is not intended that the authorization to make standards of identity shall apply to foods which are truly proprietary, that is, foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights.*" (Italics supplied).

Finally, we find that, in place of Report No. 361 a third report, No. 646, 74th Congress, was substituted, which report completely omitted all of the passage quoted from the two preceding reports except the last sentence above (printed in italics), which refers only to "foods distinctive in content as well as in name".

We are, by the italicized sentence, told just what Congress meant by "distinctive individual brands", as used in the last sentence of the first quotation set forth from Report No. 493, or "distinctive foods" as they are referred to in

the Government's brief. It means "foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights". It is quite evident that by their very nature, proprietary foods do not lend themselves to standardization. It is equally evident that the first part of the quotation from Report No. 493, 73rd Congress, was not limited to such foods, for it read: "the operation of this provision will in no way interfere with the marketing of any food which is wholesome". How, then, can it be said, as the Government maintains (Br., p. 52) that the references to the marketing of any wholesome food included only "foods distinctive in content as well as in name"?

The purpose of eliminating the distinctive name proviso,² as is shown by the testimony of Mr. Campbell quoted by the Government (Br., pp. 39, 40, 44), was to institute, for products like *Bred Spred*, the same requirements of informative labeling, as prevailed for other products not sold under distinctive names. It was in this manner, and not by banning such products from the market, that the "loophole afforded the dishonest manufacturer" by that proviso, was closed. (Senate Report No. 361, 74th Congress, 1st Sess., p. 10.)³

Furthermore, it is entirely clear that the last italicized sentence² quoted from Report No. 361 deals with the formulation and promulgation of standards of identity and not, as the Government would have it, with the exclusionary effect of those standards. The words are "authorization to make" standards of identity. That is by no means the same thing as a declaration of what the legal result of the application of such standards will be. In sum, it is hardly con-

² The proviso, Sec. 8 of the Food & Drug Act of 1906, 34 Stat. 770, is quoted at pages 38 and 39 of the Government's brief.

³ Dunn, Federal Food, Drug & Cosmetic Act (1938), hereinafter referred to as "Dunn."

ceivable that this sentence could be construed to mean any more than that proprietary foods are not to be standardized.

It does not seem needful to recapitulate the Government's argument that Mr. Campbell's testimony that "there can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying" (Br., p. 44, Dunn, p. 1239), and other statements to the same effect, are inconsistent with later utterances or reports of committees. The Government is vague on this point. In fact, it apparently attempts to support the point only by the discussion above dealt with, concerning the meaning of certain Senate Committee Reports. A perusal of Mr. Campbell's remarks is sufficient to see the fallacy of the argument.

In reality, the Food & Drug Administration was interested in two basic improvements: the elimination of the distinctive name proviso, which we have discussed, and the enactment of legally enforceable standards so that, as Mr. Campbell said (Br., p. 44, Dunn, p. 1239), a preserve product deficient in fruit "would be a substandard product and its marketing *as a preserve* would be proscribed" (emphasis supplied) and so that, as Congressman Chapman and Mr. Campbell agreed (Br., p. 45, Dunn, p. 1243) "if a man wants to buy cider which is one part cider and two parts water, he will have the privilege of doing that," but "if it is sold only *as cider* it must have only the quantity of water that the standard permits" (emphasis supplied).

The whole point was that the consumer ought not to pay for water—or some other cheap substitute—thinking he was getting the genuine article which he expected. When does he expect the more expensive or normal product? Obviously, when the food he purchases is sold *as* such product and not otherwise.

We submit, therefore that neither the *Quaker Oats* de-

cision nor the legislative history of the statute lend a whit of substance to the Government's contention that a product such as Claimant's Imitation Jam was to be barred from Interstate Commerce under this Act. Indeed, we go further and express the opinion that, had Congress known that the statements in the Committee Reports above noted and the Declarations of Mr. Campbell were not to be the guiding principles in the Administration of Section 403(g), there would be no such provision in the law.

III

The Imitation Jam under Seizure Was Not Misbranded When Introduced Into Interstate Commerce or While Held for Sale After Shipment in Interstate Commerce.

We have emphasized that the *Quaker Oats* case, the case of *Libby, McNeill & Libby v. United States*, 148 F. 2d 71 (C. A. 2), and the legislative history of the statute all point to the conclusion that the aim and effect of the statute, and particularly of Section 403(g), is to prevent the sale of a substandard article as a food for which a standard has been prescribed. This, then, is the effect intended by Congress by its use of the term "purport" in Section 403(g).

This view, it seems to us, is not only required by authority and history, but is necessary to avoid the violent consequences which would follow adoption of the Government's position—consequences which, as we have seen, would operate in the field of unstandardized as well as in the field of standardized foods.

We may now consider the application of this view to claimant's Imitation Jam.

There are two jurisdictional aspects to the legal and factual situation presented in the instant case: (1) that aspect relating to misbranding when a food is "introduced

into or while in interstate commerce" and (2) that aspect relating to misbranding while the food is being "held for sale after shipment in interstate commerce" (Sec. 304(a)). The label filed by the Government alleged both types of misbrandings. Unless the government sustains its charges of misbranding either (1) when the imitation jam was introduced into or while in interstate commerce or (2) while the food was held for sale after shipment in interstate commerce, the instant seizure cannot be maintained.

Aspect number (1) is manifestly not pertinent to the facts of this proceeding. It is clear that the imitation jam was not sold as the standardized food in interstate commerce. The lower court found that the good faith of the claimant was not challenged in the proceeding (Finding of Fact 9, R. 22); that the product is sold to the consuming public at prices substantially lower than those of "genuine fruit products" (Finding of Fact 13, R. 23); and "that the articles of food seized are sold in interstate Commerce without deception" (Finding of Fact 17, R. 23).

How can it be said then, in terms of the language of the Act, that the imitation jam was misbranded "when introduced into or while in Interstate Commerce" (Sec. 304(a))? Such a conclusion clearly cannot be reached if the test is, as we have suggested, whether or not the food is sold as the standardized food. The imitation jam did not, therefore, "purport" and certainly it was not represented, to be the food for which a standard had been prescribed, when it was introduced into or while it was in Interstate Commerce.

Aspect Number (2)—Misbranding while the food is held for sale after shipment in interstate commerce—presents entirely separate considerations.

The concept of the misbranding of an article while it is

being held for sale appeared in the statute as enacted in 1938, in Section 301(k).⁴

This concept was later introduced into the seizure provision (Section 403(a)) by the Miller amendment.⁵

The purpose of Section 301(k) and that portion of Section 304(a) in question is clearly shown by the language employed—to stop local violations which were not reached by the concept of misbranding in Interstate Commerce (Aspect (1), *supra*).

The court found, in the instant case, that (Finding of Fact 11, R. 22):

“11. That retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitation jams and jellies *similar to the product* seized in this action and that such product bore the imitation label as hereinbefore set forth.” (Emphasis supplied.)

It further found that products “similar to those seized” were sold to ranches, hotels, restaurants, etc., and that “at least on one menu in a hotel where jellies and preserves were listed, ‘a product similar and identical to the product seized’ was served without disclosure that it was an imitation (Finding of Fact 18, R. 23).”

If our view be accepted that the imitation jam was not misbranded when introduced into or while in Interstate Commerce, it will be clear from a review of all the findings of the lower court that the only possible violation of the

⁴ Section 301(k), as amended:

“(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.”

⁵ Act of June 24, 1948, Sec. 1, 62 Stat. 582.

Act in this case is the practice reflected in findings 11 and 18, above noted. It is equally apparent that any such violation is purely local in nature committed either by the retailer or the restaurant or hotel owner, and is cognizable only as a misbranding while the imitation jam is held for sale after shipment in Interstate Commerce.

To reach just such violations was the plain purpose of Section 301(k) and the "held for sale" portion of Section 304(a). If the government had limited its libel allegations to this aspect of misbranding claimant would not be faced with the prospect of business ruin due to local acts over which he had no control. He could, if the government should prevail under such limited allegations, continue to ship his products with no fear of criminal or injunction proceedings against him, since the misbranding would be recognized as a local act for which the shipper himself was not liable.

But do findings 11 and 18 actually reflect a misbranding while the article was held for sale? They refer to abuses, perpetrated in the handling of products "similar" to those seized. Surely the fact that *similar* products are so misbranded does not justify seizure of plaintiff's product in this action, unless it also was misbranded in the manner described by the findings. Only the shipment itself which is misbranded is subject to seizure. We are confident, therefore, that such a novel doctrine will not be espoused by this Court.

Therefore, given these findings of the Court, which concededly did not incorporate in full the offers of proof of the government attorney, we see no substance in the contention that the food in question was misbranded "while being held for sale after shipment in Interstate Commerce". If, however, the Court should take another view, we think we have shown that, in no event is there any basis for application of the drastic theory by the government that the

Imitation Jam was misbranded "when introduced into or while in Interstate Commerce".

IV

• **The Imitation Jam under Seizure Is a Healthful, Economically Useful Product Sold at a Price 50% Less Than the Standardized Food and Is Not Comparable to Bred Spread.**

The government has apparently attempted to associate the guilt of "*Bred Spread*" with claimant's Imitation Jam. (Br. p. 37 et seq.). This attempt to imply that the Imitation Jam was deceptively sold as an economic adulteration in an attempt to "chisel" a larger margin of profit out of the purchasing public is completely refuted by the record in this case and the findings of fact made by the trial court.

In view, however, of the government's implication of improper motivation in the manufacture and marketing of Imitation Jam, we find it necessary to emphasize the critical differences between the product seized here and the "*Bred Spread*" marketed in the early 1930's.

Bred Spread bore no statement of ingredients on its label. The product, although manufactured with 50% of the most expensive ingredients missing was sold to the public at a price "so slightly below the standard quotations for the standard product that there was no indication to the consumer of the difference between the product 'Bredspread' and the product 'preserves'." (Italics supplied.)⁶

By contrast, the Imitation Jam here seized fits every test specified by Mr. Campbell in his official capacity as Commissioner of Food and Drugs, as required of an article of food which should be permitted the channels of interstate commerce.

⁶ Statement of W. G. Campbell, Food and Drug Administrator, at Hearings on S. 2800, 73rd Congress, 2d Session, 1934, pp. 512-513; Dunn, p. 1123.

The Imitation Jam is a wholesome, nutritious food (Finding of Fact 5, R. 22). Indeed, there was no attempt on the part of the government to show that it was any less wholesome, any less nutritious, or had any less food value than standardized jam; its label clearly states the ingredients therein contained, together with the word "imitation" as required by the imitation section, Section 403(c) of the 1938 Act; and the product is sold at a price well below that of the standard jam, as will hereafter be seen.

As we have indicated, claimant had, for a number of years prior to the enactment of the 1938 Act, manufactured a food product containing approximately the same proportion of ingredients and cooked to the same degree of consistency as the present product, which was sold to the housewives of America as a "compound". At the request of the Denver station of the Food and Drug Administration, the claimant relabeled his product "Imitation" Jam. A representative label for Imitation Strawberry Jam is attached below.



This label was devised under the direct supervision of the Denver Station, Food and Drug Administration. The trial court found that the labels on the seized articles conformed in all respects with the requirements of Section 343(c), Title 21 U.S.C. (Section 403(c)).⁷

The majority opinion of the Court of Appeals made some mention of the label and indicated that "the name of the fruit and the word 'jam' were in larger and bolder letters than the word 'Imitation'" (R. 59). Claimant believes that it will be apparent to the court that the attached label, which is identical in all respects with the label of the food seized, with the exception of the size of the container and its contents, conforms with the requirements of law. If the Food and Drug Administration should feel, however, that the label does not meet those requirements, claimant will immediately label his "imitation" product to conform.

Claimant is confident that he could continue to market his imitation product and achieve excellent public acceptance of the same even though the law read that the word "imitation" was required to be set in type twice the size of the "name of the food imitated". Claimant is confident of his position in the marketing of a substandard Imitation Jam because, even in the food industry, which is perhaps the most competitive of all retail businesses, he is able to market a wholesome, nutritious food product at a price which is some 50% lower than the price of standardized jam.

Claimant has not and is not embarking upon a program of economic exploitation at the expense of the general public. On the contrary, he passes on the savings to the purchaser in terms of a 50% reduction in price.

As tangible evidence of these savings the following are representative, comparative prices for "imitation" and

⁷ Conclusion of Law 3, R. 24.

standardized jam on February 27, 1951 at Safeway Stores, Incorporated, Englewood, Colorado.

SAFEWAY STORES, INCORPORATED

Englewood, Colorado

Prices in effect February 27, 1951

Food Product	Size	Cost per container	Cost per ounce
Delicious Brand, Imitation Strawberry Jam	16 oz.	24¢	1.5¢
Valamont Brand, Pure Strawberry Jam	12 oz.	38¢	3.1¢
Welch Brand, Pure Strawberry Jam	10 oz.	36¢	3.6¢
Delicious Brand, Imitation Grape Jam	31 oz.	36¢	1.16¢
Valamont Brand, Pure Grape Jam	12 oz.	27¢	2.0¢
Delicious Brand, Imitation Red Raspberry Jam	31 oz.	41¢	1.32¢
Old Mause Brand, Pure Red Raspberry Jam	12 oz.	30¢	2.5¢
Welch Brand, Pure Red Raspberry Jam	10 oz.	31¢	3.1¢

The prices above quoted clearly show the price of the "imitation" jam is a "positive indication" to the consumer of the difference between Imitation Jam and standardized jam. The danger expressed by Administrator Campbell in the *Bred Spread* case, as cited on page 40 of the government's brief, is not present in this action. The consuming public knows by the price of the imitation jam, and the "imitation" label itself, that they are not purchasing standardized jam.

Conclusion

For the reasons stated above and in petitioners' opening brief, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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